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Chairman: Mr. Tulbure ..... (Moldova)

Contents

Agenda item 82: Report of the International Law Commission on the work of its fifty-ninth session (*continued*)

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07-57622 (E)

The meeting was called to order at 3.10 p.m.

Agenda item 82: Report of the International Law Commission on the work of its fifty-ninth session (*continued*) (A/62/10)

1. **Mr. Brownlie** (Chairman of the International Law Commission), introducing chapters IV, V and IX of the Commission's report (A/62/10), noted that reservations to treaties, the subject of chapter IV, had been on the Commission's programme of work since 1993. In 2007 the Commission had adopted nine draft guidelines, which dealt with the determination of, and the incompatibility of a reservation with, the object and purpose of a treaty.

2. Draft guideline 3.1.5 set out the conditions under which a reservation would be incompatible with the object and purpose of a treaty — i.e., if it affected an essential element of the treaty that was necessary to its general thrust such that the reservation impaired the raison d'être of the treaty. The term "essential element" was to be understood in terms of the object of the reservation as formulated by the author and was not necessarily limited to a specific provision. It might be a norm, a right or an obligation which was essential to the "general thrust of the treaty". The latter expression was intended to convey the balance of rights and obligations that constituted the substance or the general concept underlying the treaty. The formulation of draft article 3.1.5 was intended to strike an acceptable balance between the need to preserve the integrity of the treaty and the desire to facilitate the broadest possible participation in multilateral conventions. It indicated a direction rather than establishing a clear criterion that could be applied in all cases. Accordingly, it had been considered appropriate to complement it in two ways: by seeking to specify means of determining the object and purpose of a treaty, the subject of draft guideline 3.1.6, and by illustrating the methodology more clearly through a series of examples, as reflected in draft guidelines 3.1.7 to 3.1.13.

3. It was very difficult to devise a single set of methods for determining the object and purpose of a treaty and a certain subjectivity was inevitable. The treaty must be interpreted as a whole, in good faith, in its entirety, in accordance with the ordinary meaning given to the terms of the treaty in their context, including the preamble, taking into account practice and, when appropriate, the preparatory work of the treaty and the circumstances of its conclusion. Those were the parameters underlying draft guideline 3.1.6, which partly reproduced the terms of articles 31 and 32 of the Vienna Conventions.

4. The Commission had felt that it was almost impossible to draw up an exhaustive list of potential problems that might arise concerning the compatibility of a reservation with the object and purpose of the treaty. It was considered necessary to examine particular situations that might arise from practice. That was the intent of draft guidelines 3.1.7 to 3.1.13, which were illustrative in nature.

5. Draft guideline 3.1.7 dealt with the question of vague or general reservations. The requirement for precision in the wording of reservations was implicit in their very definition. Although "across-the-board" reservations were common, they were valid only if they purported to exclude or modify the legal effect of the treaty as a whole with respect to certain specific aspects. States were free to formulate reservations, but the other parties must be entitled to react, either by accepting or by objecting to the reservation, and they could not do so if the text of the reservation did not allow its scope to be assessed, as was often the case when a reservation invoked the internal law of a State.

6. Draft guideline 3.1.8 underlined the principle that a reservation to a treaty rule which reflected a customary norm was not *ipso jure* incompatible with the object and purpose of the treaty. Customary norms were binding on States, independently of their expression of consent to a conventional rule, although States might opt out by agreement *inter se*; they could do so through a reservation, providing that the latter was valid. However, a reservation concerned only the expression of the norm in the context of the treaty, not its existence as a customary norm. It followed that States remained bound by the customary norm, independently of the treaty, although a State could reject the application through a treaty of a norm which could not be invoked against it under general international law.

7. Nevertheless, the customary nature of a provision which was the object of a reservation had important consequences with respect to the effects produced by the reservation. Once established, such a reservation prevented the application of the conventional rule in the reserving State's relations with the other parties to the treaty, but it did not eliminate that State's

obligation to respect the customary norm. The somewhat complicated wording of paragraph 2 of draft guideline 3.1.8 might be explained by the diversity *ratione loci* of customary norms: some might be universal in application while others had only a regional scope and might even be applicable only at a purely bilateral level.

8. Draft guideline 3.1.9, entitled "Reservations contrary to a rule of *jus cogens*", constituted a compromise between two opposing views in the Commission. One was that the peremptory nature of the norm to which the reservation related would invalidate the reservation, while the other was that the logic behind draft guideline 3.1.8 should apply and that it should be accepted that such a reservation was not invalid in itself, provided that it concerned only some aspect of a treaty provision setting forth the rule in question and left the norm itself intact. There had been general agreement that a reservation should not have any effect on the content of the binding obligations stemming from the *jus cogens* norm. That consensus was reflected in draft guideline 3.1.9.

9. That guideline also covered cases in which, although no rule of *jus cogens* was reflected in the treaty, a reservation would require that the treaty be applied in a manner conflicting with *jus cogens*. Some members of the Commission had been of the view that draft guideline 3.1.9 had to do more with the effects of reservations than with their validity and that it did not answer the question of the material validity of reservations to treaty provisions reflecting *jus cogens* norms.

10. Draft guideline 3.1.10 covered reservations to provisions relating to non-derogable rights. The question of such reservations was very similar to the question of reservations to treaty provisions reflecting peremptory norms of general international law. However, non-derogable provisions and rules of *jus cogens* were not necessarily identical. The non-derogable nature of a right protected by a human rights treaty revealed the importance with which it was viewed by the contracting parties, and it followed that any reservation aimed at preventing its implementation would, without doubt, be contrary to the object and purpose of the treaty. It did not follow, however, that the non-derogable nature of the right in itself prevented a reservation from being formulated to the provision setting out the right in question, provided that it applied only to certain limited aspects relating to the implementation of that right.

11. Nevertheless, it was necessary to proceed with the utmost caution, and in drafting the guideline the Commission had therefore taken care not to give the impression that it was introducing an additional criterion of permissibility with regard to reservations. The assessment of compatibility referred to in the draft article concerned the reservation's relationship to the "essential rights and obligations arising out of the treaty" or, in other words, its effect on "an essential element of the treaty", which was identified in draft guideline 3.1.5 as one of the criteria for assessing incompatibility with the treaty's object and purpose.

12. The underlying principle of draft guideline 3.1.11, concerning reservations relating to internal law, was that a State should not use its domestic law as a cover for not actually accepting any new international obligation, even though the treaty's aim was to change the practice of States parties. The term "particular norms of internal law" was used broadly to include customary norms or norms of jurisprudence and not only written rules of a constitutional, legislative or regulatory nature.

13. Draft guideline 3.1.12 provided criteria for assessing the validity of reservations to general human rights treaties, combining three elements that might be helpful for that purpose: the indivisibility, interdependence and interrelatedness of the rights set out in the treaty; the importance of the right or provision that was the subject of the reservation within the general thrust of the treaty; and the gravity of the impact that the reservation had upon it.

14. Draft guideline 3.1.13 dealt with reservations to treaty provisions concerning dispute settlement or monitoring of the implementation of the treaty. A review of the case law on the subject had led the Commission to recall that the formulation of reservations to treaty provisions was not in itself precluded unless such regulation or monitoring was the purpose of the treaty to which a reservation was being made. Nevertheless, the Commission indicated that a State or an international organization could not minimize its substantial prior treaty obligations by formulating a reservation to a treaty provision concerning dispute settlement or monitoring of treaty implementation at the time it accepted the provision.

15. The Commission would welcome replies to the four questions on reservations to treaties set forth in chapter III of its report. Answers to the question "What conclusions do States draw if a reservation is found to be invalid for any of the reasons noted in article 19 of the 1969 and 1986 Vienna Conventions?" would be particularly useful for the further consideration of the issue.

16. Turning to chapter V of the report on shared natural resources, he recalled that in 2006 the Commission had adopted 19 draft articles on the law of transboundary aquifers, together with commentaries thereto. During its fifty-ninth session, the Commission had focused on the relationship between the work on transboundary aquifers and any future work on oil and gas, and it had established a Working Group on shared natural resources to assist the Special Rapporteur on the topic in considering a future work programme.

17. In his fourth report (A/CN.4/580), the Special Rapporteur had pointed out that the looming prospect of a water crisis that would affect hundreds of millions of people, particularly in the developing world, required the urgent formulation of an international legal framework for reasonable and equitable management of water resources, international cooperation and settlement of disputes. He had therefore proposed that the Commission should proceed with the second reading of the draft articles on the law of transboundary aquifers in 2008 and that it should treat that subject independently of any future work on oil and gas.

18. The Special Rapporteur had given a brief overview of the origin of oil and gas, the history of the modern oil industry, the exploitation of oil and gas and the impact of such exploitation on the environment. He had highlighted four considerations that pointed to the need for different management policies for groundwaters and for oil and gas: freshwater was a vital resource for human beings for which no alternative existed and was an essential component of ecosystems; the survey and extraction of groundwaters were essentially land-based, whereas most oil and gas exploration and production were sea-based; the manner in which the two kinds of resources were traded differed; and oil and gas posed different environmental concerns from those surrounding groundwaters. However, since oil and gas were often found in the same reservoir rock, the Special Rapporteur had suggested that the two should be treated as one resource for the purposes of any future work by the Commission.

19. Members of the Commission had, on the whole, agreed with the Special Rapporteur's overview on the similarities and dissimilarities and on the recommendation that the Commission should proceed with and complete the second reading of the law of transboundary aquifers independently of any future work on oil and natural gas. However, differing views had been expressed regarding whether the Commission should deal with oil and gas at all and, if so, how it should proceed. Some members had believed that the Commission should take up the matter only after it had completed the second reading of the law of transboundary groundwaters, and should decide at that time whether or not oil and gas should be considered at all. Other members, recalling that the topic as originally conceived in 2000 had already included the study of oil and gas, saw no further need for the Commission to discuss whether or not the topic should be considered and favoured drawing up a clear timetable leading to the commencement of work on oil and gas as a matter of priority. While acknowledging the complexity of the issues surrounding oil and gas, those members had noted that there was sufficient State practice to proceed and that the development of a regime for the exploitation of transboundary oil and gas would provide legal clarity and certainty.

20. Concerning the approach to be followed in dealing with oil and gas, some members had noted there were already certain aspects of the law relating to transboundary aquifers that might be relevant in respect of oil and gas, although in some instances the content of the rules or obligations might not be the same. However, other members had stressed the differences in the characteristics of groundwater and of oil and gas and had felt that a different approach would be called for, noting in particular that the principle of unitization for joint development was essential in developing a regime for oil and gas.

21. Some members had suggested that some additional preliminary research on State practice should be carried out, preferably with the assistance of the Secretariat, before a definitive position was taken on whether or not the progressive development and codification of the law on oil and gas would be merited. Discussion of the matter had been pursued further in the Working Group, where it had been agreed as a first step to prepare a questionnaire on State

practice for circulation to Governments. The questionnaire, which had already been issued by the Secretariat, would, inter alia, seek to determine whether there were any agreements, arrangements or practice regarding the exploration and exploitation of transboundary oil and gas resources or for any other cooperation on the matter, including maritime boundary delimitation agreements, unitization and joint development agreements and other arrangements. It had also been suggested that the Secretariat should assist in the identification of expertise within the United Nations system to provide scientific and technical background information.

22. Moving on to chapter IX, on the obligation to extradite or prosecute (*aut dedere aut judicare*), he said that the Commission had considered one draft article submitted by the Special Rapporteur on the topic, concerning the scope of application of the future draft articles on the topic. The Commission's debate was summarized in paragraphs 353 to 368 of the report. Members had dealt, in particular, with the source of the obligation to extradite or prosecute, its relationship with universal jurisdiction, the scope of the obligation and its two constitutive elements, and the question of the surrender of an alleged offender to an international criminal tribunal — the so-called "triple alternative" suggested by the Special Rapporteur.

23. The source of the obligation to extradite or prosecute had been considered central to the topic. Some members had been of the view that the obligation had a customary status, but had considered that the precise scope of that customary obligation needed to be further clarified. Some members had felt that the Commission should focus on identification of the crimes that were subject to the obligation.

24. With respect to the scope of the obligation, views as to the two elements "to extradite" and "to prosecute" and their mutual relationship had differed. According to some members, the custodial State had the power to decide which part of the obligation it would execute. Other members had noted that the obligation to extradite or prosecute could arise in different scenarios, which should be taken into account by the Commission. Members had also signalled the need for the Commission to determine the precise meaning of the part of the obligation referred to as "*judicare*", but had cautioned that it should not embark upon an analysis of the technical aspects of extradition law.

25. Some members had indicated that the question of surrender to an international criminal tribunal should not be dealt with in the Commission's work on the topic, but others had been of the view that the Commission should address at least certain issues regarding surrender, such as those cases in which it could paralyse the obligation to extradite or prosecute. Some members had stressed that the obligation to extradite or prosecute and the concept of universal jurisdiction, while sharing the same objective, should be distinguished from one another. It had been suggested that the Commission should deal with universal jurisdiction only in so far as it related directly to the topic, and it had been proposed that the relationship between the two notions should be addressed in a specific provision of the future draft articles.

26. Members had supported in principle the first draft article submitted by the Special Rapporteur, but had made a number of comments on its precise formulation, which were indicated in paragraph 360 of the report. Comments had also been made on the suggestions by the Special Rapporteur as to possible articles to be drafted in the future. Support had been expressed for the proposal that, in 2008, the Special Rapporteur should present a systematic survey of the relevant international treaties in the field. It had been stressed, however, that the topic also required a comparative analysis of national legislation and judicial decisions. Accordingly, Governments were requested to submit information concerning their laws and practices with regard to the obligation *aut dedere aut judicare*, particularly contemporary ones, and were invited to respond to the three questions posed in paragraph 32 of the report. The Commission would also welcome any further information and views that Governments might consider relevant to the topic.

27. **Mr. Ehrenkrona** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the topic of reservations to treaties was a highly practical one to which the Nordic countries attached great value, and the Commission's consideration of it had shed light on several important procedural questions. The Nordic countries looked forward to the Commission addressing the most interesting and important matter, namely the consequences of reservations considered incompatible with the object and purpose of a treaty. It was of fundamental importance that all States that

became partner to a treaty should, as a minimum, commit themselves to its object and purpose. Ratification was an expression of consent to be bound and a State should not, therefore, be permitted to accede to a treaty, especially one of a normative multilateral character, and at the same time nullify central provisions through reservations. Such reservations should be considered null and void, as emerged clearly from article 19 of the Vienna Convention on the Law of Treaties. Objections were not necessary to establish that fact and should only be considered a way of drawing attention to it. Treaty monitoring bodies played a special role in that regard, but unless there was a body authorized to classify a reservation as invalid, objections still played an important role. Having established that a reservation was null and void, it was necessary to consider its effects on the treaty relations between the reserving State and other contracting States. In that regard, significant comments had been made at the Commission's meeting with human rights experts, including representatives of monitoring bodies, to discuss reservations to human rights treaties.

28. A growing number of States, including the Nordic States, were developing the practice of severing invalid reservations from the treaty relations between the States concerned, a practice which accorded well with article 19 of the Vienna Convention. In the case of normative multilateral treaties, severability fulfilled the aim of promoting their universality and integrity. In the case of bilateral treaties, severability made treaty relations possible and permitted dialogue within the treaty regime.

29. Account should be taken of the will of the reserving State concerning the relationship between ratification and the reservation. Unless a reserving State explicitly made ratification dependent on its reservation, the basic expression of consent to be bound by the rules of the treaty as a State party should be presumed to take priority over the reservation, since the latter was considered null and void. It was important to exercise caution when considering whether to allow differences in dealing with the effects of invalid reservations, depending on the nature of the treaty, in order not to risk further undermining the unity of treaty law. The specific character of normative multilateral treaties such as human rights treaties might nonetheless warrant a separate approach.

30. Late reservations remained a source of concern for the Nordic countries and deserved further consideration and discussion. Late reservations should not be considered valid simply because no State had objected. The role of the depositary regarding manifestly invalid reservations would help in calling the attention of contracting States to the fact that a reservation had been formulated late but might prove insufficient.

31. Concerning the topic of shared natural resources, the Nordic countries were in general pleased with the draft articles on the law of transboundary aquifers and had noted the invitation to submit observations by 1 January 2008. As it was particularly important for States not to cause harm to other aquifer States, the "significant harm" threshold in articles 6 and 11 was too high and uncalled for. Moreover, the precautionary approach should be strengthened by an explicit reference to the precautionary principle. The Nordic countries were also pleased that the Special Rapporteur had proposed, and the Commission had agreed, that the second reading of the draft articles on transboundary aquifers should proceed in 2008 and that the subject should be treated independently of any future work by the Commission on issues related to oil and gas. The challenges of managing groundwater were quite different from those related to oil and gas, as were the environmental impacts and commercial aspects.

32. Regarding oil and gas, there was already a vast array of bilateral agreements and practices regarding unitization. The legal context was also quite different, bearing in mind the framework of the Law of the Sea and the more specific legal regulations and arrangements in place nationally and bilaterally. A different approach was called for: oil and gas exploitation often required investments of a certain magnitude, and there was, moreover, a duty to cooperate and find practical solutions of benefit to all parties concerned, or it might not prove economically feasible for either State to exploit the resources. Bilateral agreements could reflect the specific circumstances of each case but more general regulations would not easily provide the specific practical solutions needed. It would therefore be more fruitful for the Commission to accelerate work on other topics. The Nordic countries reserved their position on whether the Commission should extend its work on shared natural resources to include oil and gas.

33. With regard to the topic of the obligation to extradite or prosecute, the Nordic countries felt that there were grounds to claim that the obligation had or was acquiring customary status with regard to crimes such as genocide, crimes against humanity, war crimes, torture and terrorist crimes. The Commission had concluded in its 1996 Draft Code of Crimes against the Peace and Security of Mankind that genocide, crimes against humanity and war crimes would fall under the obligation *aut dedere aut judicare*. The importance of the practical commitment of States to ending impunity for those crimes was also reflected in the Rome Statute of the International Criminal Court, which built on the principle of complementarity. The anti-terrorist conventions and protocols adopted under United Nations auspices contained a consistently formulated *aut dedere aut judicare* obligation upon the State party in whose territory the alleged offender was present to either extradite that person or submit the case to its competent authorities for prosecution. Security Council resolution 1373 (2001) and subsequent resolutions on terrorism also helped to consolidate the obligation by urging all States to become parties to the relevant instruments and by expressly stating that terrorist offenders must be brought to justice. The obligation was a common feature in modern criminal law conventions but specific formulations differed and the clauses did not always set forth a clear obligation.

34. The Commission had put a number of questions concerning the way in which States saw the obligation to extradite or prosecute and whether it was connected to universal jurisdiction. Whether treaty-based or customary, the obligation, like universal jurisdiction, would entail a broad right for a State to exercise jurisdiction even where the crime, the perpetrator or the victims had no connection to it. To the extent that the *aut dedere aut judicare* principle could be seen to create an absolute obligation to exercise extraterritorial jurisdiction if the State did not extradite the alleged offender to another State (which was not clear in all conventions) it should nevertheless be distinguished from universal jurisdiction because of its mandatory nature. The quasi-universal jurisdiction established by the principle might in practice come close to the principle of universality, in particular in jurisdictions that did not recognize the principle of vicarious administration of justice. Extending the principle of universal jurisdiction to the relevant crimes might often be an effective way to implement the obligation to extradite or prosecute.

35. The content of the clause containing the obligation to extradite or prosecute, should be interpreted in the context of each convention. In the anti-terrorism conventions and protocols, it was clear from the recurrent references to the laws of the State that the obligation was subject to prosecutorial discretion in the country concerned. There was thus no obligation to punish and the obligation was fulfilled by submitting the case to the competent authorities for investigation and possible prosecution. Extradition as an alternative to prosecution would also be implemented within the framework of the judicial system of the State concerned. As for limitations on extradition, it should be recalled that the "extradite or prosecute" clause had first been introduced in the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft as a compromise between those favouring an absolute obligation to extradite and those wishing to retain some restrictions in that connection. It therefore had to be concluded that any prohibition against applying national law to extradition, such as prohibition of the political offence exception, a common feature in recent anti-terrorist instruments, must be clearly expressed in the instrument and could not be deduced from the general nature of the obligation.

36. With regard to the "triple alternative", regardless of whether the Commission extended its consideration to surrender to the International Criminal Court, it was clear that States must meet their obligations with respect to international criminal jurisdictions.

37. **Mr. Vundavalli** (India), having welcomed the progress made by the Commission on the topic of reservations to treaties, said that his delegation would be responding in writing to the Commission's questions on that issue. However, it shared the view that the legal effects of a reservation that was invalid in accordance with article 19 of the Vienna Convention on the Law of Treaties were not clear from articles 19 to 23 of the Convention. The invalidity of a reservation could not lead to the assumption that the treaty was fully binding on the State in question. Such an interpretation would affect the readiness of States to accept treaties.

38. With regard to the topic of shared natural resources, his delegation agreed with the Special Rapporteur's recommendation (A/CN.4/580, para. 15) that the Commission should proceed with and complete the second reading of the law of transboundary aquifers

independently from its future work on oil and natural gas, since the considerations for dealing with transboundary oil and gas resources were different from those relating to transboundary aquifers. While some of the regulations of the law of the non-recharging transboundary aquifer might be relevant to the question of oil and natural gas, the majority of regulations to be worked out for oil and natural gas would not be directly applicable to groundwater.

39. Turning to the obligation to extradite or prosecute, he said that his delegation welcomed the plan for further development of the topic proposed by the Special Rapporteur in his second report (A/CN.4/585) and his ideas on articles to be drafted in the future, including his proposal for a draft article stating "Each State is obliged to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party". The international instruments against terrorism, drug trafficking, transnational organized crime, trafficking in persons and corruption all provided for the obligation to extradite or prosecute. The main objective of that obligation was to ensure that persons accused of serious crimes were denied safe haven and could be brought to trial for their criminal acts. Such provisions served as an important tool in global efforts to combat serious offences, including those relating to terrorism. His delegation looked forward to receiving further reports from the Special Rapporteur proposing draft rules on the concept, structure and operation of the obligation to extradite or prosecute.

40. **Mr. Hafner** (Austria), commenting on the topic of reservations to treaties, said that one of the most sensitive issues was undoubtedly the definition of the object and purpose of a treaty, quite rightly called one of the enigmas of international law. Draft guideline 3.1.5 attempted to define it by reference to the essential elements and general thrust of the treaty, as well as to its raison d'être. His delegation agreed that it was almost impossible to define the object and purpose of a treaty, not the least because of its subjective character. What one State party deemed essential in a treaty could be a minor issue to the other, and it had to be asked whether the definition of object and purpose in the guideline would be applicable to all instances where the law of treaties referred to that notion. The attempt at definition in draft guideline 3.1.5 was nonetheless generally laudable. It could, however, be asked whether there existed elements of a treaty which were essential but not necessary to its general thrust, or whether an element was essential only because it was necessary to the treaty's general thrust. Dropping the adjective "essential" might reduce the number of subjective elements.

41. The only alternative in the guidelines to defining the object and purpose was to concentrate on the procedure of definition in each individual case, as was done in draft guideline 3.1.6, whose wording had much in common with that of articles 31 and 32 of the Vienna Convention on the Law of Treaties. The obligation regarding recourse to elements in addition to the context lacked stringency: the text provided that those elements might be taken into account, so that the question arose as to who decided whether or under what circumstances they would be taken into account. By stating that subsequent practices might be resorted to only "when appropriate", the draft guideline added another uncertainty. In view of the vagueness of the elements of object and purpose, a better structured procedure for their definition would be more appropriate. There was no reason why reference to the other elements could not be mandatory. Avoiding uncertainty was all the more important if the legal consequence of incompatibility with object and purpose, namely inadmissibility of the reservation, was taken into account.

42. Practice reflected a wide use of vague or general reservations whose effect on the treaty provisions was hard to establish. Irrespective of their wide use, draft guideline 3.1.7 obviously tended to exclude such . That approach, which was in keeping with the gist of the definition of reservations in the Vienna Convention on the Law of Treaties, was acceptable to his delegation, but doubts remained as to whether such exclusion would find its place in practice. The wording of the draft guideline also left unclear the consequences of non-compliance with the prescription. He wondered whether such reservations would become subject to the same effect as other inadmissible restrictions, such as those incompatible with object and purpose.

43. Reservations prohibited under draft guideline 3.1.7 as vague or general might also fall under the definition in draft guideline 1.1.1 of reservations that purported to modify the legal effect of the treaty as a whole with respect to certain aspects in their application to the State formulating the reservation. It

therefore appeared that a reservation could fall within the purview of both guidelines, constituting a reservation under draft guideline 1.1.1 which was, however, prohibited under draft guideline 3.1.7.

44. Austria had dealt with vague or general reservations and had tried to develop a particular procedure to give the author of such a reservation the possibility to reflect on its formulation. Such a procedure should allow for assessing the effect of the reservation or identifying that part of the reservation which would be incompatible with the treaty's object and purpose, so that objections could be made accordingly. Two years previously, his delegation had expressed its position on draft guideline 3.1.7 declaring that such reservations were incompatible with object and purpose, and had proposed a "reservations dialogue" in order to clarify the scope of the reservation. No State formulating such a reservation had yet reacted to the request for further information. However, a guideline providing for such a procedure could trigger a practice of such exchanges of views. Draft guideline 3.1.7 seemed to be more radical in that it disqualified such reservations. Although the draft guideline would hopefully be reflected in future practice, thought should nevertheless be given to alternatives to such a radical solution. The reference to a "reservations dialogue" in paragraph (11) of the commentary could be placed in the text of the guideline itself. But if the reserving State offered no response, there seemed no choice but to interpret the reservation in its widest meaning, thus implying that it was incompatible with the object and purpose of the treaty, and to treat it as inadmissible and therefore null and void.

45. Concerning draft guideline 3.1.8, the fact that a treaty norm reflected a norm of customary international law was no impediment to the formulation of a reservation. There was therefore no need to retain paragraph 1 of the guideline. Austria's objections to the Guatemalan reservations to the Vienna Convention on the Law of Treaties had accordingly been very cautious with regard to their admissibility, seeking to ascertain that well-established rules remained unfettered by the reservation. It was therefore clear that the main gist of the draft guideline was in paragraph 2.

46. The commentary often referred to the practice of various human rights bodies, including the European Court of Human Rights, in order to derive some general conclusions from their decisions. It should, however, kept in mind that the European Convention on Human Rights contained a special regime for reservations so that decisions of the European Court could be used only with some caution.

47. Regarding individual cases of prohibited reservations, his delegation maintained its preference, as stated two years previously, for addressing the issue by a general clause and elaborating on it in the commentary. However, since the Commission had previously adopted the draft guidelines, some comments were in order. Whereas draft guideline 3.1.9 concerning *jus cogens* raised no major problems, his delegation found draft guideline 3.1.10 unclear. Although a specific non-derogable right was at issue, the criterion for assessing the validity of the reservation was deduced from the entirety of the treaty, namely the essential rights and obligations arising from the treaty. But the yardstick for the admissibility of a reservation to a non-derogable right should be the specific provision entailing that right rather than the entire treaty. It would therefore be preferable to refer to a certain provision in the singular, so that it would read: "A State or an international organization may not formulate a reservation to a treaty provision relating to a non-derogable right unless the reservation in question is compatible with the essential rights and obligations arising out of this provision". The second sentence seemed to add nothing to the first and was rather confusing, since it added a condition of incompatibility unrelated with the criterion of the first sentence and therefore led to additional vagueness.

48. Draft guideline 3.1.1 on reservations relating to internal law had to be assessed in comparison with draft guideline 3.1.7; it differed from the latter insofar as it referred only to certain specific norms of internal law. It was easier to establish a possible incompatibility with object and purpose only if the national norm was spelled out in the text of the reservation. If not, a "reservations dialogue" would be helpful, even if not necessary, in order to assess that effect.

49. Concerning draft guideline 3.1.12 regarding human rights treaties, his delegation wondered why there was a general guideline on reservations incompatible with object and purpose and a separate one on reservations incompatible with object and purpose formulated with respect to human rights treaties. The draft guideline obviously established criteria other than those under draft guideline 3.1.5.

Should the latter be considered additional to those under draft guideline 3.1.5? Or did draft guideline 3.1.12 constitute a *lex specialis* to draft guideline 3.1.5? In any case, the criterion of the importance of the provision within the general thrust of the treaty and the gravity of the impact of the reservation raised more problems than it solved. Even if a judicial treaty body decided on the importance of the provision and the gravity of the impact, those terms were open to subjective interpretation. Adding only the first criterion to those already embodied in draft guideline 3.1.5 would also remove any doubts as to whether the procedure under draft guideline 3.1.6 applied to human rights treaties.

50. Concerning the questions raised by the Special Rapporteur, Austria's statement two years previously regarding Austrian practice in that regard could serve as a first response. In Austria's view, a prohibited reservation was without legal effect, so that the State formulating it could not benefit from it for various reasons. Whereas on the one hand the intention of the relevant State to become a party to the treaty had to be respected, on the other hand that State also had to respect the conditions under which it could become a party. Consequently, if a reservation was regarded as null and void, the consent to be bound by the treaty was not affected by the illegality of the reservation.

51. Turning to the principle of *aut dedere aut judicare* and the question raised in paragraph 31 (a) of the Commission's report (A/62/10), he said that Austrian criminal jurisdiction existed irrespective of that principle if Austria was obliged under international law to prosecute even if the acts were committed abroad and were not punishable under the law of the State where the crime was committed. The question in paragraph 31 (b) raised the issue of a connection between universal jurisdiction and the principle of *aut dedere aut judicare*. In Austria, extraterritorial criminal jurisdiction was governed by sections 64 and 65 of the Austrian Criminal Code. Under section 64, certain crimes committed abroad were punishable under Austrian law even if they were not punishable under the law of the State where they were committed; they included inter alia crimes against the State, crimes against or committed by Austrian civil servants, crimes against Austria's highest organs, certain acts of aerial piracy, forgery, and terrorist acts. Section 65 defined crimes committed abroad which were punishable under Austrian law only if they were punishable under the law of the State where they were committed. Those crimes encompassed those committed by an Austrian national, if they were punishable under the law of the State where the crime was committed or if the perpetrator was a foreigner, was arrested in Austria and could not be extradited for reasons other than those resulting from the character of the crime. However, those crimes could no longer be prosecuted if they were no longer punishable in the State where they were committed, when the perpetrator had been acquitted by a foreign court, when the perpetrator had been sentenced by an Austrian criminal court, or as long as the execution of the sentence had been suspended.

52. Austria's answer to the question not in paragraph 31 (c) was that there was no connection between universal jurisdiction and the principle of *aut dedere aut judicare*. Concerning the question of a connection between that principle and nationally provided universal jurisdiction, he stressed that, either on the basis of international agreements or for the purpose of protecting Austrian interests, Austria had extended its criminal jurisdiction to crimes committed by foreigners abroad even if those crimes were not punishable under the law of the State where they were committed. Examples of such extension partly on the basis of international obligations were crimes where Austrian interests were impaired or the perpetrator was Austrian or the foreign perpetrator could not be extradited; they included inter alia slavery, trafficking in persons, criminal organizations, drug crimes, crimes against the security of civil aviation, and production and distribution of weapons of mass destruction. Other cases of such extension were those deriving from international obligations such as grave sexual abuse of minors, when the perpetrator was Austrian or the foreigner had domicile in Austria.

53. Concerning the question raised in paragraph 32 (a), Austria emphasized that it had embodied the principle *aut dedere aut judicare* as a general principle in section 65 (1) of its Criminal Code. The principle applied provided that the crime was punishable under the law of the State where it was committed. In any case, Austrian criminal law applied to Austrians who could never be extradited to States that were not members of the European Union with regard to crimes committed by them abroad, provided that the acts were punishable under the law of the State where they were perpetuated. With regard to crimes committed by foreigners, Austrian law also applied if they could not

be extradited for reasons other than those resulting from the nature of the acts.

54. Austria asserted jurisdiction over certain crimes occurring abroad even if the perpetrator was a foreigner; those crimes included, in addition to those whose prosecution was mandatory under international law, inter alia, treason, attacks on the highest State organs, attacks against the Austrian Army or against an Austrian official, or false testimony in an Austrian procedure.

55. His delegation considered that the principle *aut dedere aut judicare* did not constitute a rule of customary international law but could only be agreed by means of an international treaty for specific crimes.

56. **Mr. Mársico** (Argentina) said that his delegation agreed with the content of the draft guidelines on reservations to treaties and endorsed the principle of not limiting the right to make objections to reservations to reservations considered incompatible with the object and purpose of the treaty. The definition of that right contained in draft guideline 2.6.3 was particularly useful in that it set no limit on the reasons for making such objections, it being understood that they must be in accordance with the Vienna Conventions and general international law. Accordingly, it was superfluous to introduce in the draft guidelines a distinction between major and minor objections. Draft guidelines 2.6.7 and 2.6.8 were helpful in imparting clarity to international relations, while draft guideline 2.6.10 would contribute to the dialogue between the reserving State and those called upon to assess the validity of the reservation. Draft guideline 2.6.14 was also valuable in distinguishing between pre-emptive objections and late objections. It was not necessary to distinguish between tacit acceptance and implicit acceptance of reservations, since the legal effects were the same. As for the right of members of an international organization to take a position on the validity or appropriateness of a reservation to its constituent instrument, set out in draft guideline 2.8.11, that right continued to have legal effects, since the opinion thus expressed could contribute to the reservations dialogue, while at the same time nothing prevented States from objecting to a reservation already accepted by the organization concerned. His Government supported the proposal contained in draft guideline 2.8.12 to consider the express or tacit acceptance of a reservation to be final and irreversible, thereby ensuring the stability and legal security of treaty relations.

57. Turning to the topic of shared natural resources, he said that his delegation welcomed the proposal to treat the subject of transboundary aquifers separately from issues related to oil and gas and appreciated the attention paid to the specificity of transboundary aquifers worldwide, including the extensive Guarani aquifer system, located in the sovereign territorial jurisdictions of Argentina, Brazil, Paraguay and Uruguay. The draft articles adopted on first reading were clear, objective and balanced and usefully set out applicable general rules as normative proposals. Their final form could be a declaration or a framework convention offering guidance for the conclusion of detailed agreements and other arrangements in regard to the operation and management of transboundary aquifers by the States concerned. His delegation supported the inclusion of the affirmation of a State's sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory, as set out in draft article 3, and welcomed the importance given to the precautionary approach, particularly in draft article 11 which, together with related draft articles concerning the prevention, reduction and control of pollution, was of central importance.

58. With regard to the obligation *aut dedere aut judicare*, he said that, in view of the existence in that regard of a rule *in statu nascendi*, as opposed to an established principle of customary law, and the lack of clear concepts or uniform criteria among States with regard to the issue, it was too early to propose draft articles. It would be advisable to wait until more comments had been received from States concerning their practice and legislation. Moreover, treaties establishing the principle *aut dedere aut judicare* would offer valuable guidance regarding the obligation as they would be prima facie albeit not sufficient evidence of its acceptance by States. The customary law character of the principle would need to be shown on a case-by-case basis, according to the type of crime involved. While there existed an *opinio iuris* with regard to the most serious crimes, namely genocide, crimes against humanity and war crimes, that did not warrant any conclusion as to the application to such crimes of the principle in question or of a universal jurisdiction. He encouraged the Commission to continue its efforts to compile and analyse the rules and case law of States with a view to the eventual establishment of a new customary norm.

59. **Mr. Duan** Jielong (People's Republic of China) said that the draft guidelines on reservations to treaties should reconcile the freedom of States to make reservations with the need to safeguard the integrity and universality of treaties and should be in line with the 1969 and 1986 Vienna Conventions. While draft guidelines 3.1.5 and 3.1.6 largely embodied the relevant provisions of those Conventions, it would be desirable, in addition to defining the object and purpose of a treaty in general terms, to give consideration to different types of treaty. Moreover, reservations should not contravene relevant international obligations and, in accordance with article 27 of the 1969 Vienna Convention, must not invoke provisions of a State's internal law as the reason for non-implementation of the treaty.

60. The separation of reservations to general human rights treaties, covered by draft guideline 3.1.12, and reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty, covered by draft guideline 3.1.13, implied different criteria and might well cause confusion; the two provisions should be deleted or, if not, clarified in the commentary. His delegation did not consider it appropriate to formulate independent guidelines in respect of the content of draft guidelines 3.1.7, 3.1.9 and 3.1.10. Reservations contrary to a rule of *jus cogens* usually went against the object and purpose of the treaty and could therefore be considered incompatible with them, while vague or general reservations and reservations to provisions relating to non-derogable rights did not necessarily contravene the object and purpose of the treaty and should be judged on a case-by-case basis. As for reservations to a treaty provision reflecting a customary norm, allowed by draft guideline 3.1.8, which stipulated however that such reservations did not affect the binding nature of the norm, the criteria for such reservations should not deviate from the general guidelines on reservations, since treaties reflecting customary norms were just one type of treaty. The norm in question would no longer, however, be applicable between the reserving State or organization and other parties to the treaty. Lastly, since the making of an objection to a reservation was also an act of treaty-making, it should follow the general legal rules of treaty-making: the words "for any reason whatsoever" in draft guideline 2.6.3 should therefore be replaced by "for any reason within the limits of this guideline and rules of international law".

61. On the topic of shared natural resources, the work might take the final form of a set of principles or a non-binding declaration, since conditions were not yet ripe for the formulation of an international treaty. Moreover, in view of the considerable divergence of views concerning the desirability of studying the issue of transboundary oil and gas resources, the Commission should seek the further views of States before taking a decision in that regard. It should be borne in mind that the development and use of transboundary oil and gas involved the permanent sovereignty of States over their natural resources and complex legal and technical questions.

62. Turning lastly to the topic of *aut dedere aut judicare*, he said that application of that obligation should not compromise the jurisdiction of States or affect the immunity of State officials from criminal prosecution. His delegation supported in principle the alternative nature of the obligation set out in draft article 1, but took a cautious approach to the third component of the so-called "triple alternative", since it was necessary to set limits on the alternative obligations of States. The draft articles should stipulate that, in accordance with the relevant rules on jurisdiction priorities, the State where the crime had occurred and the State of nationality of the suspect should have priority in exercising jurisdiction. It should also be made clear that "jurisdiction" as used in draft article 1 referred to territorial jurisdiction or actual control of a State over the individual concerned and did not include extraterritorial jurisdiction of a State over individuals outside its territory on the basis of such principles on personal jurisdiction of protective jurisdiction. He suggested that the words "under their jurisdiction" in that draft article should be changed to "in their territories or under their actual jurisdiction or control" or that the appropriate explanation should be provided in the commentary. While the obligation to extradite or prosecute was basically a treaty obligation, it might also become an obligation under customary international law if the crime to which it was applied was a crime under the customary law universally acknowledged by the international community. The crimes covered by that obligation should be primarily international crimes, transnational crimes endangering the common interest of the international community under international law, and serious crimes endangering the national and public interest, under domestic law. Thought might be given to including in the draft articles a non-exhaustive list of such crimes.

The Commission should study the applicability of the conditions for the prohibition of extradition set out in the extradition rules of States and the conditions for prosecution provided for in their codes of criminal procedure. It could then determine whether it was necessary to establish a set of common criteria for extradition and prosecution. It might also study further the relations between that obligation and other rules of international law, including universal jurisdiction.

63. **Ms. O'Brien** (Ireland) welcomed the choice of the topic *aut dedere aut judicare*, particularly in view of the increasing transborder dimension of many crimes, which required cooperation among States to ensure that offenders did not enjoy impunity. Her delegation considered that, while there was much common ground between the obligation to prosecute or extradite and the principle of universal jurisdiction, the two principles served different functions in the international legal order. It would therefore indeed be appropriate to formulate a second draft article containing a definition of the terms, and it would also be useful to study further, as suggested by the Special Rapporteur, the impact of surrender to an international criminal tribunal on the obligation to extradite or prosecute. The unclear relationship between that obligation and the possibility of surrender to an international tribunal was complicated by the fact that not all States were parties to the Rome Statute, as well as by the complementary nature of the jurisdiction of the International Criminal Court, which left States with the primary responsibility for bringing offenders to justice. It was important to define clearly the relationship between the two elements of the obligation *aut dedere aut judicare*, which, moreover, could only be fully understood with reference to State practice and related domestic legal provisions. She called on the States concerned to give the utmost assistance to the Special Rapporteur in his proposed systematic review in that area, which should be supplemented by a thorough analysis of relevant international treaties, thereby making it possible to determine the form to be taken by the outcome of the work on the topic.

64. **Ms. Negm** (Egypt), speaking on the topic of reservations to treaties, said that contractual relations between States were governed primarily by the Vienna Convention on the Law of Treaties and that the International Law Commission should focus on clarifying any ambiguity in the provisions of that Convention, without attempting any redrafting. Any State that objected to the reservation to a treaty formulated by another State should give the reasons for its objection, which should be compatible with article 19 of the Convention and with the object and purpose of the treaty. The effect of such objections differed, however, depending on whether the agreement was bilateral or multilateral and, in the former instance, on the subject matter, as in the case of an agreement on the delineation of maritime boundaries and an agreement on judicial cooperation, for example. It was also important to consider the effect of an objection to a reservation to a multilateral treaty in the same light, particularly where legal procedures in the contracting State in such matters as personal status were involved. Such an objection would, for example, affect the objecting State's recognition of a judgement of a court of first instance in connection with the subject of the reservation. It would not, however, affect the authority of the reserving State to implement the agreement in a manner consistent with its reservation.

65. With regard to shared natural resources, the Commission should continue its radical treatment of the topic; natural resources in the territory of a State should be exclusively subject to its national jurisdiction. Draft article 3, on the law on transboundary aquifers was welcome, strengthening as it did the sovereignty of States over their own part of such aquifers, in accordance with General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources. It was important to include the term "equitable utilization" in the proposed draft articles. Concerning draft article 6, it should be incumbent on any State with recharge or discharge zones located in its territory to cooperate with aquifer States, particularly with regard to protection of the environment and the obligation of the former to prevent pollutants from entering aquifers. As for draft article 10, the terms "recharge" and "discharge" should be included in the proposed draft article on use of terms in order to avoid any misinterpretation of their meaning.

66. Her delegation would prefer the Commission to develop general rules on transboundary natural resources, whether aquifers or oil and gas, all of which were usually the subject of bilateral agreements. It also welcomed the seminars on the draft articles organized by the United Nations Educational, Scientific and Cultural Organization, which should be extended to

Asia and Africa with a view to increasing awareness of the subject and of the legal effects arising from the division of shared natural resources.

67. On the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), the differing contractual obligations of States should be taken into consideration. It was also important to respect the principle of the territoriality of criminal law, except with regard to the prosecution of citizens of one State who committed crimes in another State and who were not tried for those crimes by the latter State. Under Egyptian criminal law, Egyptian citizens in that situation were to be prosecuted in Egypt because their deportation was prohibited under the Egyptian Constitution and they could not therefore be surrendered for trial before a foreign court. Egypt nevertheless had an obligation *aut dedere aut judicare* pursuant to bilateral agreements concluded with numerous States; in the absence of such agreements the principle of reciprocity was applied. Egypt's jurisdiction over its citizens in criminal matters was therefore clearly not universal in the sense indicated in the report of the Commission. Lastly, she emphasized the need to consider the relationship between the obligation *aut dedere aut judicare* and customary law.

68. **Mr. Álvarez** (Uruguay) stressed the importance of the topic of shared natural resources for countries, like Uruguay, that had substantial groundwater resources and experience in managing them jointly with other countries of the region. His delegation continued to believe that, notwithstanding the differences between the question of aquifers and that of oil and natural gas, there were considerable similarities between the two respective approaches and that, for that reason, a further study should be made of the regime for fuels before a final decision could be reached on the adoption of separate texts. The draft articles should serve as guidelines, recommendations or models to be drawn on by States with shared aquifers in the conclusion of multilateral agreements or arrangements for their management, use and preservation. Draft articles 3 and 19 were particularly valuable in that regard. A detailed reading of the draft articles adopted on first reading by the Commission would enable the Committee to reach an opinion regarding their final form, the specific measures proposed and the desirability of addressing the question of aquifers independently, pending further exploration of the regimes for oil and gas.

69. The topic of *aut dedere aut judicare* was crucial for the protection of human rights. The most important source of guidance in that regard was the Draft Code of Crimes against the Peace and Security of Mankind, adopted by the Commission in 1996, and the Rome Statute of the International Criminal Court. He also drew attention to Uruguay's Law No. 18.026 on cooperation with the International Criminal Court in combating genocide, war crimes and crimes against humanity, which provided in its article 4.2 for State prosecution of suspected perpetrators of such crimes, in the absence of any request for their extradition or for their surrender to the Court, thereby giving support to the "triple-alternative" approach.

70. **Ms. Rodríguez Pineda** (Guatemala) said that the draft articles on the law of transboundary aquifers were valuable for helping to solve the practical problems that could arise in that area. Her Government was in the process of preparing written comments for submission to the Commission. The issue was highly relevant to Guatemala, since most of its territory included transboundary water basins and aquifers. Her delegation therefore attached particular importance to draft articles 7, 13, 15 and 19, the common element of which was cooperation. Guatemala's major challenge was that it had insufficient institutional, legislative and technical capacity to address problems in a coordinated manner, whether at the local, regional, national or multinational level, and to propose strategies for practical and sustainable solutions.

71. It would be premature to take a decision on the final form of the draft articles at the current stage. However, given the importance of strengthening cooperation and mitigating conflicts over groundwater resources, a model convention which interested States could adapt to their particular needs would be the most useful and practical solution. Such a model convention could encourage States to strengthen existing mechanisms or to adopt new ones for the management and utilization of such resources. A non-binding instrument was the most appropriate means of reconciling the broad range of economic, political and environmental interests involved.

72. Her delegation welcomed the Special Rapporteur's work with regard to oil and gas resources, but considered that, before proceeding with it in detail, account should be taken of the progress made with regard to transboundary aquifers, particularly as the latter topic continued to be the subject of comments

from States. The two topics should be tackled separately, given the unique nature of the resources involved, though not necessarily in parallel, since issues relating to oil and gas were more complex than those relating to groundwaters and had significant political implications.

73. The obligation to extradite or prosecute was one of the most effective tools for combating impunity and was long established in treaty law. However, it varied in terms of its use, interpretation, application and the types of crime to which it applied. Moreover, it was difficult to determine whether and to what extent the obligation also derived from customary international law. Draft article 1, proposed by the Special Rapporteur in his second report (A/CN.4/585, para. 76), was somewhat premature, since many questions still needed to be clarified. Her delegation was not convinced that the obligation to extradite or prosecute should be regarded as two "alternative" obligations that were independent from each other; rather, the two were interdependent. Her delegation therefore called for a more cautious study of the implications of the obligation.

74. Both components of the obligation presented practical difficulties, since, in order to prosecute, jurisdiction must first be established. In addition, it was not clear whether the mere initiation of an investigation was sufficient to fulfil the requirement of prosecution or whether proceedings had to reach the stage of sentencing. Moreover, there were limits on extradition, namely the requirement of double criminality, the question of whether a treaty existed between the requested and the requesting States, and exceptions for certain offences such as those of a political or military nature.

75. In Guatemala, the extraterritoriality of criminal law was limited and extradition was governed exclusively by treaties. However, the obligation to extradite or prosecute had been incorporated into a number of special criminal laws. The most practical way of addressing the obligation was to establish extradition as a primary obligation and to provide for a subsidiary obligation to prosecute only when extradition was not possible. The aim was to avoid political tension in the implementation of the obligation, since both the requested and the requesting States could invoke the right to choose between extradition and prosecution. It was therefore important to determine what circumstances might trigger the obligation; those circumstances would be covered by what the Special Rapporteur referred to as the establishment of the obligation.

76. With regard to the other elements of the draft article, further consideration should be given to the content and application of the obligation under customary international law and current international criminal law, given the development of institutions that complemented the obligation to extradite or prosecute, such as universal jurisdiction, mutual assistance and international cooperation, and international criminal tribunals. No attempt should be made to draw up lists of crimes to which the obligation should apply. Rather, criteria should be established for identifying categories of common interest for the international community. It would be relevant to receive information from Member States on crimes to which the obligation applied in their national jurisdiction. Moreover, while the subject of universal jurisdiction was relevant, it was not a decisive factor. It was not, therefore, necessary to specify the relationship and the interdependence between the obligation and universal jurisdiction. Rather, it was important to distinguish between the two in order to avoid confusion. Lastly, the obligation should be imposed on the State in whose territory the alleged offender was located, including cases in which the person was not in the territory of the State in question but was subject to its control. In cases of concurrent jurisdiction, priority should be given to the State in whose territory the crime had been committed.

77. **Mr. Witschel** (Germany) said that the function of State practice as reflecting specific legal convictions was apparent when it came to responding to reservations to international treaties. The common endeavour was to prevent, as far as possible, the proliferation of exceptions that weakened the integrity of treaties. In that context, his delegation was pleased to note that the number of objections to invalid reservations had increased in recent years, particularly with regard to treaties containing human rights guarantees and those designed to combat international terrorism. Such objections showed that the existing Vienna regime on the law of treaties by and large provided the necessary tools, even if some provisions were not entirely adequate with regard to multilateral treaties.

78. The Commission's work on the draft guidelines on reservations to treaties complemented State practice. The Special Rapporteur's analysis of the legal

tool of objections in his eleventh report (A/CN.4/574) had no doubt been instrumental in encouraging more States to object to invalid reservations. Moreover, the examination in his twelfth report (A/CN.4/584) of the acceptance of reservations was of considerable interest, given that an objection could be made in writing whereas acceptance could be tacit under article 20, paragraph 5, of the Vienna Convention on the Law of Treaties. However, such a presumed acceptance could be fictitious.

79. The fact that the Commission had referred a considerable number of draft guidelines to the Drafting Committee during its fifty-ninth session indicated that it had made significant progress. His delegation would continue to support the Commission's work in that regard, which should focus on a systematic analysis of the issue with a view to producing results that could be applied in State practice.

80. With regard to shared natural resources, the question of whether it would be possible to draft rules on shared deposits of oil and gas and whether such rules should be modelled on those relating to groundwater resources remained open. Concerning transboundary water resources, while surface water had been dealt with in numerous international instruments, groundwater was only nominally included in the scope of those instruments, mainly insofar as it was related to surface water or formed part of a system of both surface water and groundwater. Occasionally, groundwater had been omitted intentionally in regimes governing the management of surface water. Only a few treaties and other legal instruments primarily addressed groundwater or contained provisions focusing on groundwater.

81. However, an analysis of recent binding and non-binding legal instruments on groundwater revealed at least some indications of emerging rules for groundwater management on which the Commission could build its work. Given the lack of a coherent legal regime on shared groundwater resources, it was appropriate that the Commission was considering rules governing the management and protection of transboundary groundwater resources within the topic of shared natural resources. Nevertheless, efforts with regard to management, including equitable and reasonable utilization, were still at an early stage. Two results should be sought: first, it should be established in a binding form that the utilization of groundwater had to meet internationally agreed standards; and second, provision should be made for cooperation not only at the level of States but also at the level of municipalities. Both outcomes should reflect the emerging idea that access to drinking water of sufficient quantity and quality might constitute a human right. Furthermore, it should be clearly established that the utilization of groundwater, whether transboundary or not, should take into account the needs of future generations. Therefore, damage to an aquifer belonging to one particular State, even if it was caused only by that State, should be a matter of international concern.

82. With regard to the obligation to extradite or prosecute, Germany recognized that the principle of universal jurisdiction and the right of every State to prosecute genocide, war crimes, crimes against humanity, slavery and piracy were firmly established in customary international law. However, it was doubtful whether there was yet a common opinion among States or sufficient evidence of State practice with regard to the existence of such an obligation beyond the cases covered by binding international agreements. As the Special Rapporteur had pointed out in his second report (A/CN.4/585), the response to that question given by members of the Commission and the Committee had been rather cautious. Nonetheless, ongoing developments should be given due attention. Moreover, Germany's firm legal position was that States had a duty to combat impunity and to ensure that perpetrators of such serious crimes did not find safe havens.

83. **Mr. Astraldi** (Italy), noting the Commission's intention to pursue its work on oil and gas under the topic of shared natural resources, said that the subject of oil and gas was a complex one which raised considerable difficulties of a political and technical nature. It would therefore be appropriate for the Commission to begin by carrying out a preliminary assessment of the feasibility of useful work on the subject, in the light of an examination of available practice. It was possible that current arrangements mainly reflected specific concerns and did not lend themselves to providing the basis for general rules. An analysis of existing practice should also lead the Commission to determine whether there were any issues on which a statement of general rules, whether intended to become binding or not, could make a significant contribution to solving existing problems.

84. Progress had undoubtedly been made with regard to the obligation to extradite or prosecute, particularly with regard to the definition of the scope of the obligation, which should remain at the centre of the Commission's work. However, he reiterated his delegation's concern about the suggestion to widen the topic to include the issue of universal jurisdiction in criminal matters. Although the latter was a related subject, it deserved direct examination by the Commission as a separate topic, since its implications went far beyond those of the obligation to extradite or prosecute.

85. Turning to the topic of reservations to treaties, he said that the extensive commentaries to the draft guidelines adopted at the Commission's fifty-ninth session, while reflecting the remarkable scholarship of the Special Rapporteur, seemed to lose sight of the purpose of providing a guide to practice, that contained essential information in a clear and concise form. The Commission should refrain from addressing details whose inclusion in the Special Rapporteur's report was appropriate but which had less reason to be included in the commentaries to the adopted draft guidelines.

86. The draft guidelines adopted by the Commission at its fifty-ninth session constituted a brave attempt to define when a reservation was to be deemed incompatible with the object and purpose of the relevant treaty. The Commission's conclusions appeared to be generally acceptable, although they provided only limited guidance. That applied in particular to draft guideline 3.1.11, "Reservations relating to internal law". The Commission's view that such reservations could be formulated only insofar as they were compatible with the object and purpose of the treaty did not appear to add to the general rule in article 19, subparagraph (c), of the Vienna Convention on the Law of Treaties. In addition, draft guideline 3.1.7, "Vague or general reservations", seemed misplaced, since it concerned form rather than compatibility with the object and purpose of the treaty. In his delegation's view, article 19, subparagraph (c), of the Vienna Convention established a fundamental principle, and objections concerning compatibility with the object and purpose of a treaty should not be regarded as subject to the time limits set out in article 20, paragraph 5 of the Convention. His delegation therefore had doubts about the wisdom of establishing a single regime for acceptance of reservations and objections thereto. Some of the draft guidelines suggested in the Special Rapporteur's eleventh and twelfth reports (A/CN.4/574 and A/CN.4/584) should apply only to reservations that had passed the test of validity.

87. **Mr. Buchwald** (United States of America), referring to the topic of reservations to treaties, said that many of the draft guidelines set out in the Special Rapporteur's twelfth report (A/CN.4/584) provided a useful statement of general treaty practice. However, certain draft guidelines regarding reservations to constituent instruments of international organizations, in particular draft guideline 2.8.11, required further consideration. In general, the United States was wary of attempts to go beyond the terms of the Vienna Convention on the Law of Treaties, for example by defining the object and purpose of a treaty, because the resulting provisions might be misleading or unsupported by State practice.

88. With regard to the topic of shared natural resources, his delegation welcomed the Commission's recent decision to undertake a second reading of the draft articles on the law of transboundary aquifers without delving into the issue of oil and gas. The work on transboundary aquifers constituted an important advance in that it provided a possible framework for the reasonable use and protection of aquifers, which were playing an increasingly important role as water sources for human populations. Nonetheless, there was still much to learn about transboundary aquifers in general, and specific aquifer conditions and State practice varied widely. Moreover, the draft articles went beyond current law and practice. For those reasons, his delegation continued to believe that context-specific arrangements, as opposed to a global framework convention, were the best way to address pressures on transboundary groundwaters. Numerous factors could be taken into account in any specific negotiation, such as the hydrological characteristics of the aquifer at issue; current uses and expectations regarding future uses; climate conditions and expectations; and economic, social and cultural considerations. His delegation was still not convinced that a global treaty would garner sufficient support, but recognized that many States had expressed an interest in such an instrument and that the draft articles had been elaborated with such an instrument in mind. If the Commission continued in that direction, it should also include final articles appropriate for a convention and additional articles establishing the relationship between

that convention and other bilateral or regional arrangements. In particular, it should be careful not to introduce provisions that superseded existing bilateral or regional arrangements or to limit States' flexibility to enter into such arrangements.

89. Noting that the Commission had circulated a questionnaire asking States about their practice with regard to transboundary oil and gas deposits and whether gaps existed that could usefully be addressed by the Commission, he said that, while his delegation did not object to the idea of such a questionnaire, it ultimately did not support consideration of the topic of transboundary oil and gas resources by the Commission. States were well aware of the political and economic stakes associated with such resources, and were not, therefore, in as much need of instruction or encouragement by the Commission in dealing with them. Indeed, the subject of transboundary oil and gas had not generally given rise to real conflicts and, when issues had arisen, States had worked out practical accommodations. Therefore, Commission efforts to extrapolate customary international law from divergent and sparse State practice would not be a productive exercise.

90. Turning to the topic of the obligation to extradite or prosecute, he said that the United States was a party to a number of international conventions that contained such an obligation. It considered those conventions an important aspect of collective efforts to deny terrorists and other criminals a safe haven. However, its practice, as well as that of other States, reinforced the view that there was not a sufficient basis in customary international law or State practice for the formulation of draft articles that would extend the obligation to extradite or prosecute beyond binding international legal instruments that contained such an obligation. States undertook such obligations only by becoming parties to binding international legal instruments that contained relevant provisions, and those obligations extended only to other States that were parties to the instruments in question and only to the extent of the terms of such instruments. Otherwise, States could be required to extradite or prosecute an individual in circumstances where they lacked the necessary legal authority to do so, such as the necessary bilateral extradition relationship or jurisdiction over the alleged offence.

91. The Commission had invited Governments to provide information on their legislation and practice regarding the topic. His delegation urged the Commission to allow sufficient time to receive and evaluate such information. Analysis of State practice would be important in determining how the Commission should proceed. As had been noted in the Commission's report on its fifty-eighth session (A/61/10, para. 229), if the obligation to extradite or prosecute existed only under international treaties, draft articles on the topic might not be appropriate.

The meeting rose at 5.55 p.m.